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NO. 87-1855 (4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THOMAS K. GILHOOL, Petitioner,

v.

RUSSELL A. MUTH, JR., et al., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE THE STATE OF NORTH CAROLINA IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. WHETHER CONGRESS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES WHEN IT ENACTED THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT?

2. WHETHER CONGRESS DENIED TO THE STATES THE AUTHORITY TO MOLD THEIR ADMINISTRATIVE PROCESS FOR REVIEWING THE COMPLAINTS OF PARENTS TO THEIR FORM OF GOVERNMENT WHEN IT ENACTED THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT?

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENTS 5

I. THE ELEVENTH AMENDMENT BARS THE AWARD OF DAMAGES AGAINST THE STATES FOR VIOLATION OF THE EHCA. 7

II. IN ENACTING THE EHCA, CONGRESS DID NOT, AND COULD NOT, DENY TO THE STATES THE AUTHORITY TO MOLD THE ADMINISTRATIVE PROCESS FOR REVIEWING THE COMPLAINTS OF PARENTS TO THEIR FORM OF GOVERNMENT. 13

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed2d 171 (1985) 10
Board of Education v. Dienelt, 843 F.2d 813 (4th Cir. 1988) 8
David D. v. Dartmouth School Committee, 775 F.2d 411, 422 (1st Cir. 1985) 11
Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986) 12
Employees v. Missouri Public Health and Welfare Department, 411 U.S. 279, 284, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973) 10
Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) 9
Fullilove v. Klutznick, 448 U.S. 448, 474-475, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) 9
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 1005 S.Ct. 105, 83 L.Ed.2d 1016 (1985) 10
Gary A. v. New Tier High School District No. 203, 796 F.2d 940 (7th Cir. 1986) 12
Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) 8
Hall v. Vance County Board of Education, 774 F.2d 629, 634-635 (4th Cir. 1985) 8
Hendrick Hudson School Board v. Rowley, 458 U.S. 176, 205-207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) 7
Hutto v. Finney, 437 U.S. 678, 697 fn. 27, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) 10
Kattan by Thomas v. District of Columbia, 691 F.Supp. 1539 (D.D.C. 1988) 8
Keyes v. School District No. 1, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) 8
Lau v. Nichols, 414 U.S. 563, 569, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) 9

Max M. v. Illinois State Board of Education, 684 F.Supp. 514 (N.D. Ill. 1988) 8
Miener v. State of Missouri, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1983) 12
Olim v. Wakinekona, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) 8
Pennhurst State School And Hospital v. Halderman, 451 U.S. 1, 16-18, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) 9,15
Plyler v. Doe, 457 U.S. 202, 230, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) 8
South Dakota v. Dole, 483 U.S. ___, 107 S.Ct. 2793, 97 L.Ed 2d 171 (1987) 9
Victoria L. v. District School Board, 741 F.2d 369, (11th Cir. 1984) 15
Village of Arlington Heights v. Metropolitian Housing Department Corp., 429 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) 8
Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1987) 8
Welch v. Department of Highways & Public Transportation, 483 U.S. ___, 107 S.Ct. 2941, 97 L.Ed. 2d 389 (1987) 10
Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amend. 10 ..... Passim
U.S. Constitution, Amend. 11 ..... Passim
N.C. Const., Art. I, § 15 1,16
N.C. Const., Art. VI, § 7 16
N.C. Const., Art. IX, § 2 1
N.C. Const., Art. IX, § 5 3

STATUTORY PROVISIONS

N.C. Gen. Stat. § 115C-10 (1985) 16
N.C. Gen. Stat. § 115C-110(a) (1977) 4, 5, 13
N.C. Gen. Stat. § 115C-116 (1977) 4
20 U.S.C. § 1400 (b)(9) 7
20 U.S.C. § 1400(c) 12

20 U.S.C. § 1401(7) 13
20 U.S.C.§ 1412(6) 13,16
20 U.S.C. § 1415 16
20 U.S.C.§ 1415 (b)(2) 14
20 U.S.C. § 1415(e)(4)(B) 11
20 U.S.C. § 1415(e)(4)(G) 11
29 U.S.C. § 794 12
40 U.S.C. § 1400, et seq. 2
42 U.S.C. § 2000d 12
42 U.S.C. § 2000d-7 12
42 U.S.C. § 2000d-7(e)(1) 12
42 U.S.C. § 6102 12

MISCELLANEOUS

40 N.C. Att'y Gen. Op. 248 (1969) 12
1974 N.C. Sess. Laws, c. 1293 2
1977 N.C. Sess. Laws, c. 563 2
1988 N.C. Sess. Laws, c. 1079 3
1988 N.C. Sess. Laws, cc. 886 & 108 4
1975 U.S. Code Congressional and Administrative
News, pp. 1453, 1470 and 1500-152 14

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BRIEF OF AMICUS CURIAE THE STATE OF NORTH CAROLINA IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

Resolution of both issues presented for determination in the matter is of substantial importance to the State of North Carolina. Because of the importance of these issues to the State, this brief is filed on behalf of the State by its Attorney General pursuant to Rule 36.4 of the Rules of the Supreme Court.

For many years, North Carolina has been committed to assuring that handicapped children receive an appropriate education. In 1969, the Attorney General concluded that Article I, § 15 and Article IX, § 2 of the North Carolina Con-

stitution require that handicapped children be afforded the same educational opportunity as other children. 40 N.C. Att'y Gen. Op. 248 (1969).[1] In 1974 the General Assembly directed that "the State develop a system of educational opportunities for all children with special needs." 1974 N.C. Sess. Laws, c. 1293. In 1977 this system was put in place in the form of comprehensive legislation modeled after the Education of All Handicapped Children Act, 40 U.S.C. § 1400, *et seq.* (EHCA). 1977 N.C. Sess. Laws, c. 563, codified as N.C. Gen. Stat. § 115C-106 *et seq.* (1977). The State's commitment to handicapped children is manifest in the level of funds appropriated by the General Assembly each year for the education of handicapped children over and above the funds appropriated for the education of non-handicapped children. For the 1988-89 fiscal year the General Assembly appropriated $1,601.00 more for the education of each handicapped child enrolled in the public schools than for the education of each non-handicapped child.[2] This special funding totals approximately $230,000,000.00.

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1 Article I, 15 provides: "The people have a right to the privilege of an education, and it is the duty of the State to guard and maintain that right." Article IX, 2 provides, in pertinent part: "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools ... wherein equal opportunities shall be provided for all students."

2 Derived from 1988 appropriations acts by the Controller's Office, North Carolina State Board of Education.

At t he same time, North Carolina has a significant interest in preserving the Eleventh Amendment immunity of its fisc. While the General Assembly's appropriation for the public elementary and secondary schools is great - the State's appropriation for the public school system in 1988-89 was approximately $3,000,000,000.00 [3] - its resources are not unlimited. Court-ordered diversions of funds for certain programs or students necessarily impact on other programs and students, and limit the State's discretion to balance the interests and needs of all students. This interest has special force because of the low level of federal financial support derived by the State from participating in the EHCA. While the State appropriated an average of $4,007 for the education of each handicapped child enrolled in the public schools during the 1988-89 fiscal year, it only received $308 from the federal government for the education of each of those children.[4]

Further, the State has an overriding interest in molding the administrative process for reviewing the complaints of handicapped children to its form of government. Article

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3 1988 N.C. Sess. Laws, cc. 886 and 1086.

4 Derived from North Carolina's EHCA allocations for the 1988-89 fiscal year by the Controller's Office, State Board of Education.

IX, § 5 of the Constitution of North Carolina provides: "The State Board of Education shall supervise and administer the free public school system ... subject to laws enacted by the General Assembly." Consistent with this provision of the Constitution, the General Assembly has assigned to the State Board of Education responsibility for assuring that each local school board provide appropriate educational opportunities to handicapped children.[5] N.C. Gen. Stat. § 115C-110(a) (1977) provides: "The Board shall cause to be provided by all local school administrative units ... special education and related services appropriate to all children with special needs."

The General Assembly has also established an administrative process for reviewing complaints by parents of handicapped children that local school systems have not provided their children with an appropriate education. Prior to July 1988, this process provided for initial administrative review by hearing officers appointed by local school boards and for an appeal to hearing officers appointed by the State Superintendent of Public Instruction. N.C. Gen. Stat. § 115C-116 (1977). In July 1988, the General Assembly amended this statute, 1988 N.C. Sess. Laws, c. 1079, to provide that the State Board of Education will make the final administrative decision following a single hearing conducted by an administrative law judge assigned by the North Carolina Office of Administrative Hearings based upon the recommended

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5 There are 140 local school systems in North Carolina. Each is governed by a locally elected or appointed school board. N.C. Gen. Stat. § 115C-35 (1955). These local boards exercise "general control and supervision of all matters pertaining to the public schools in their respective local school administrative units" subject to the "paramount powers" of the State Board of Education. N.C. Gen. Stat. § 115C-40 (1955). North Carolina, thus, is part of the "deeply rooted" tradition of "local control over the operation of schools." *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 50, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

decision, including findings of fact and conclusions of law, of the administrative law judge. This amendment brought this process into conformity with Article IX, § 5 of the Constitution, which confers on the State Board of Education the responsibility to "supervise and administer" the public school system, and N.C. Gen. Stat. § 115C-110(a) (1977), which makes the State Board responsible for assuring that local school systems provide an appropriate education for handicapped children. This new process and the State's right to make this process conform to its form of government have been placed in jeopardy by the Third Circuit's decision. Indeed, the validity of this process has been challenged in federal court. *Hedrick v. State of North Carolina*, No. C-88-843-G (M.D.N.C.).

SUMMARY OF ARGUMENTS

The Third Circuit's decision that Congress has waived the Eleventh Amendment immunity of the States for violation of the EHCA is wrong in two respects. First, Congress does not have that power. The EHCA, to some extent, was enacted by Congress pursuant to its Fourteenth Amendment powers. Primarily, however, the EHCA was enacted by Congress pursuant to its spending power. Congress' spending power is not unlimited. North Carolina submits that Congress' power under the Spending Clause is limited by other provisions of the Constitution that limit its power. The Eleventh Amendment limits Congress' power. Therefore, Congress does not have the power to require the States to waive their Eleventh Amendment immunity as a condition to participating in the EHCA, except where a violation of the EHCA is also a violation of the Fourteenth Amendment.

Second, even if Congress has the power to waive the Eleventh Amendment immunity of the States for violation of the EHCA, it did not properly exercise that power in enacting the EHCA. Even where Congress has the power to waive the Eleventh Amendment immunity of the States, two restraints exist upon the exercise of that power. First, Congress must consider the wisdom of the exercise of that power. This is required because to waive the States' immunity

without weighing the wisdom of that decision infringes the States' right to participation in the legislative process as guaranteed by the Tenth Amendment. Second, Congress must express any decision to waive the Eleventh Amendment immunity of the States in clear and unambiguous terms. A clear, unambiguous expression of such a decision is required in order to assure the States' Tenth Amendment rights. It is also required underSpending Clause legislation, like the EHCA, because such legislation is in the nature of a contract, and the States are entitled to know, in advance, the terms and conditions of their participation. Nothing in the EHCA, the amendments to the EHCA, or any other act indicates that Congress has considered the wisdom of waiving the Eleventh Amendment immunity of the States for violations of the EHCA. Nothing in the EHCA, the amendments to the EHCA or any other act amounts to a clear and unambiguous expression of a decision to waive that immunity for violations of the EHCA.

The Third Circuit's decision that Pennsylvania's Secretary of Education is prohibited by the EHCA from making the final administrative decision regarding complaints made by parents of handicapped children is also wrong in two respects. First, the decision is inconsistent with Congress' intention. Congress deemed it of paramount importance that State educational agencies be ultimately responsible for assuring that local educational agencies provide handicapped children with an appropriate education. To interpret the EHCA as denying to State educational agencies the authority to make final administrative decisions regarding complaints by parents that local school systems have not provided their children with an appropriate education, is completely at odds with Congress' intention that State educational agencies have the ultimate responsibility for assuring that handicapped children receive an appropriate education. The Third Circuit's decision divides the ultimate responsibility for assuring that all children receive an appropriate education from the responsibility to provide that assurances in a particular case, and divides the ultimate responsibility for assur-

ing that handicapped children receive an appropriate education from the authority to enforce that responsibility in a particular case.

Second, the EHCA does not impose obligations on the States not stated unambiguously. The EHCA does not unambiguously deny the States the authority to confer upon their State-level educational agencies the authority to act as the final administrative decision-maker on the complaints of handicapped children. Further, to infer this obligation infringes the Tenth Amendment. Where requirements have to be inferred, meaningful participation of the States through their elected representatives in the enactment of legislation guaranteed by the Tenth Amendment cannot have occurred

ARGUMENTS

I. THE ELEVENTH AMENDMENT BARS THE AWARD OF DAMAGES AGAINST THE STATES FOR VIOLATION OF THE EHCA.

Two Eleventh Amendment issues are present in this matter. The threshold question is whether Congress has the power to require States to surrender their Eleventh Amendment immunity as a condition for participating in the EHCA. If Congress has that power, then the question arises whether Congress has exercised that power unequivocally. We begin with the threshold issue.

A. Congress does not have the power to waive the Eleventh Amendment immunity of the States under the Spending Clause.

The EHCA embodies Fourteenth Amendment principles, 20 U.S.C. § 1400(b)(9), but its reach far exceeds those principles. Compliance with the EHCA is measured by adherence to detailed procedures regarding the identification, evaluation and development of individual education programs for handicapped children, and through assuring an opportunity for those children to an "appropriate education". *Hendrick Hudson School Board v. Rowley*, 458 U.S. 176, 205-

207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Failure to adhere to these detailed procedures is not in and of itself a violation of the Due Process Clause of the Fourteenth Amendment. See *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest of an individual; it cannot be the right to demand needless formality"). A due process violation occurs only if a school system excludes a handicapped child from school or otherwise denies his substantive interests without providing him constitutionally sufficient notice and hearing. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Similarly, failure to provide a handicapped child with an "appropriate education" is not in and of itself a violation of the Equal Protection Clause of the Fourteenth Amendment. An equal protection violation occurs only if a school system denies handicapped children as a group any education, *Plyler v. Doe*, 457 U.S. 202, 230, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), or if a particular child is intentionally discriminated against because of his handicap. *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In all but a few cases, the EHCA violation asserted is not also a violation of the Fourteenth Amendment. In this case, for example, the violations asserted by Mr. Muth do not have a Fourteenth Amendment dimension. See also *Board of Education v. Dienelt*, 843 F.2d 813 (4th Cir. 1988) (EHCA violated because a multi-disciplinary review not conducted and parents not sufficiently involved); *Hall v. Vance County Board of Education*, 774 F.2d 629, 634-635 (4th Cir. 1985) (EHCA violated because school system did not advise parents of possibility of public funding for tutor or private residential placement and insufficiency of academic program); *Kattan by Thomas v. District of Columbia*, 691 F.Supp. 1539 (D.D.C. 1988) (EHCA violated because public school program for child did not include sufficient occupational therapy); *Max*

M. v. Illinois State Board of Education, 684 F.Supp. 514 (N.D. Ill. 1988) (EHCA violated by failure to provide psychotherapy).

If the States violate the Fourteenth Amendment, Congress has the power to waive their Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Accordingly, if a State violates a Fourteenth Amendment right of a handicapped child, Congress would have the power, though it has not exercised it, to waive the Eleventh Amendment immunity of the State for that violation. However, in those cases where the EHCA violation asserted and found is not also a violation of the Fourteenth Amendment, Congress has not proscribed that violation pursuant to the Fourteenth Amendment. It has acted pursuant to its spending power.

The EHCA is primarily Spending Clause legislation, *Pennhurst State School And Hospital v. Halderman*, 451 U.S. 1, 16-18, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), and this Court has so held. *Rowley*, 458 U.S. at 204 fn. 24. Congress' power under the Spending Clause is limited. *Fullilove v. Klutznick*, 448 U.S. 448, 474-475, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980); *Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). It cannot under the Spending Clause exercise a power denied it by another part of the Constitution. The Eleventh Amendment is a limit on Congress' power. *South Dakota v. Dole*, 483 U.S. ____, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) is not to the contrary. There the Court held that Congress through its spending power may impose conditions on the States even though the conditions indirectly impact upon powers granted to the States by the Twenty-First Amendment. The Eleventh Amendment is not a grant of powers to the States. It is a limitation on the powers of Congress. Congress under the Spending Clause cannot exercise a power denied it by the Eleventh Amendment.

B. Even if it has the power, Congress has not waived the Eleventh Amendment immunity of the States.

Where Congress has the power to waive the Eleventh Amendment immunity of the States, it must consider the wisdom of waiving the immunity of the States. *Hutto v. Finney*, 437 U.S. 678, 697 fn. 27, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Employees v. Missouri Public Health and Welfare Department*, 411 U.S. 279, 284, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). If it decides to waive their immunity, Congress must then make its decision "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). See also *Welch v. Department of Highways & Public Transportation*, 483 U.S. ____, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Consideration of the immunity of the States and unmistakably clear language evidencing a decision to waive that immunity are required in this case for two reasons. First, failure to weigh the States' interests in the area of elementary and secondary education infringes the Tenth Amendment. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (the Tenth Amendment rights of the States are protected through their participation in the political process); *Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("Providing public education ranks at the very apex of the function of a State"). Second, legislation enacted under the Spending Clause, like the EHCA, is "in the nature of a contract". Thus, the States are entitled to know their obligations and liabilities in advance in order that they may make an informed decision to participate or not participate. *Rowley*, 458 U.S. at 204, fn. 26, quoting *Pennhurst*, 451 U.S. at 17. Clear, unambiguous language is especially required where, as here, the level of federal funding actually provided does not correspond to the obligations imposed. *Pennhurst*, 451 U.S. at 24 ("It defies common sense, in short, to suppose that Congress [without providing adequate funding] implicitly imposed this massive obligation on participating States").

Nothing in the EHCA as originally enacted, or its legislative history, indicates that Congress ever considered the wisdom of waiving or not waiving the Eleventh Amendment immunity of the States. Nothing in the EHCA amounts to a clear unambiguous statement that Congress intended to

waive that immunity. To the extent that courts have found a waiver they have found it necessary to infer an intention to waive. See *David D. v. Dartmouth School Committee*, 775 F.2d 411, 422 (1st Cir. 1985). An inferred waiver is *ipso facto* not the "unmistakably clear" waiver "in the language of the statute" required by *Atascadero*.

The Third Circuit inferred an intention by Congress to waive the Eleventh Amendment immunity of the States from 1986 amendments to the EHCA, specifically an amendment to 20 U.S.C. § 1415(e)(4)(B) authorizing the award of attorneys' fees. 839 F.2d at 129. That statute does authorize the award of attorneys' fees to prevailing parents. It does not, however, specifically set forth against whom the fees may be awarded. To find an intention by Congress to award fees against a State it is necessary to infer that intent from 20 U.S.C. § 1415(e)(4)(G). That is the only subsection that contains a reference to the States. It provides: "The provision of subparagraph (G) [which contains limitations on fees] shall not apply in any action if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of Section 615 of this Act." More importantly, the power of Congress to authorize attorneys' fees against a State exists separately and independently of its power to authorize the award of damages against a State. *Hutto v. Finney*, 437 U.S. at 696-698 (Costs, including attorneys' fees, treated differently for Eleventh Amendment purposes than damages).

It has also been suggested that Congress waived the Eleventh Amendment immunity of the States when it enacted the Civil Rights Remedies Equalization Act in 1986, 20 U.S.C. §2000d-7(e)(1). That statute is an "unmistakably clear" waiver of the Eleventh Amendment immunity of the States for violation of several enumerated acts. The EHCA, however, is not one of those acts. The statute provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of section 504 of the Rehabilitation Act of 1973, title

> IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

This statute does not unmistakably reflect a decision by Congress to waive the Eleventh Amendment immunity of the States for violation of the EHCA. It is not even named. Moreover, the EHCA is different in structure and purpose from the specified statutes. The EHCA is comprehensive legislation enacted for the various purposes stated in 20 U.S.C. § 1400(c). Prohibition of discrimination is not among the purposes expressly stated. On the other hand, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, the Age Discrimination Act of 1975, 42 U.S.C. § 6102, and title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, are succinct, explicit anti-discrimination statutes. To conclude that 42 U.S.C. § 2000d-7(e)(1) is an unmistakably clear waiver of the Eleventh Amendment immunity of the States for violation of the EHCA is tantamount to concluding that Congress can effectively repeal the States' immunity once and for all by enacting a statute simply providing "the Eleventh Amendment is waived."

As 42 U.S.C. § 2000d-7 reflects, Congress is fully aware that in order to waive the States' immunity it first must consider the wisdom of waiving the Eleventh Amendment immunity and then act with precision if it decides to waive that immunity. At the time it enacted that statute, the Seventh, Eighth and Ninth Circuits had held that the Eleventh Amendment protects the States from liability arising out of the EHCA. *Gary A. v. New Tier High School District No. 203*, 796 F.2d 940 (7th Cir. 1986); *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1983); *Doe by Gonzales v. Maher*, 793 F.2d 1470 (9th Cir. 1986). Presumably, Congress was aware of these decisions. Consequently, one would assume if Congress had intended to waive the Eleventh Amendment immunity for EHCA violations when it enacted 42 U.S.C. § 2000d-7 it would have specifi-

cally identified the EHCA. Therefore, its failure to do so is not indicative of an intent to waive the States' immunity, rather it is indicative of an intent not to waive that immunity.

II. IN ENACTING THE EHCA, CONGRESS DID NOT, AND COULD NOT, DENY TO THE STATES THE AUTHORITY TO MOLD THE ADMINISTRATIVE PROCESS FOR REVIEWING THE COMPLAINTS OF PARENTS TO THEIR FORM OF GOVERNMENT.

The Third Circuit Court of Appeals effectively held that the EHCA denies to a State the power to assign to the governing official or board of its State-wide public school system the power to make the final administrative decision regarding the complaints of parents that local school systems have denied their handicapped children an appropriate education. The rules of statutory construction do not permit that interpretation. Further, the Third Circuit's interpretation violates the Tenth Amendment to the Constitution.

A. The Third Circuit's interpretation is inconsistent with the intent of Congress.

The North Carolina General Assembly has directed the State Board of Education "to cause to be provided by all local school administrative units . . . special education and related services appropriate to all children with special needs." N.C. Gen. Stat. § 115C-110(a) (1977). Federal law mirrors this responsibility. For purposes of the EHCA, the State Board of Education is a "State educational agency." 20 U.S.C. § 1401(7). In order to receive federal funding, a State's educational agency must be "responsible for assuring" that all local school systems provide required appropriate educational opportunities to handicapped children. 20 U.S.C. § 1412(6). This requirement is explained in the legislative history of the EHCA.

> The committee bill requires that the State educational agency be responsible for assuring that all requirements of the Act are carried out . . . . This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency.
>
> The committee considers the establishment of a single agency's responsibility for assuring the right to education of all handicapped children of *paramount importance*. . . . While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, *so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.*

1975 U.S. Code Congressional and Administrative News, p. 1448. (Emphasis added). See also p. 1492.

The Third Circuit's decision that "a State educational agency" is precluded from making the final administrative decision on the complaints of parents of handicapped children was based largely upon the provisions of 20 U.S.C. § 1415(b)(2), which provides:.

> The parent or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

For a number of reasons, North Carolina submits that nothing in the EHCA precludes a "State educational agency" from making the final administrative decision on complaints filed by the parents of handicapped children regarding the appropriateness of the education offered or provided their children by local school systems. Indeed, to vest that authority in a "State educational agency" is entirely consistent with Congress's intention in enacting the EHCA. Arguments to the contrary, as the Eleventh Circuit Court of Appeals has held, are "frivolous". *Victoria L. v. District School Board*, 741 F.2d 369, 374 (11th Cir. 1984).

In enacting the EHCA, Congress deemed it of "paramount importance" that "in carrying out a right to education for handicapped children, the State educational agency shall be the responsible agency." Centralized authority was necessary so that "violation of the right of handicapped children is squarely the responsibility of one agency." 1975 U.S. Code Congressional and Administrative News, p. 1448. North Carolina's statute conferring authority on the State Board of Education to make the final administrative decision on complaints by parents regarding the failure of local school systems to provide them with an appropriate education squarely conforms with this congressional intention.

In this case, the Third Circuit divided the responsibility to assure that all children receive an appropriate education from the responsibility to provide that assurance in a particular case, and divided the responsibility to assure that handicapped children receive an appropriate education from the authority to enforce that responsibility in a particular case. In so doing, the Third Circuit cast aside the principle of centralized responsibility that Congress had considered to be of "paramount importance" to the effective enforcement of the EHCA. As a result the decision below is not only illogical, but also contrary to the primary rule of statutory construction that all the parts of a statute must be construed in accordance with Congress's intention. *Pennhurst*, 451 U.S. at 18. ("In expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the whole law, and to its object and policy.")

Furthermore, the interpretation of 20 U.S.C. § 1415 adopted by the Third Circuit is not consistent with the legislative history of the EHCA. The legislative history of the EHCA indicates that the only persons barred from making final decisions under 20 U.S.C. § 1415 are persons "directly involved in the education or care of the child." 1975 U.S. Code Congressional and Administrative News, pp. 1453, 1470 and 1500-1502. North Carolina's State Board of Education does not directly provide educational services to children. Further, "no public school employee paid from State or local funds, and no employee of the Department of Public Instruction [the administrative agency of the State Board of Education] or his spouse, may serve as an appointive member of the State Board of Education." N.C. Gen. Stat. § 115C-10 (1985).

Finally, North Carolina is especially troubled by the Third Circuit's opinion that Congress intended to prohibit a State educational agency from making final decisions because the agency would be predisposed to rule against parents. 839 F.2d at 124. That unsubstantiated opinion flies in the face of Congress's specific decision to impose on State educational agencies ultimate responsibility for assuring that handicapped children receive an appropriate education. 20 U.S.C. § 1412(6). Furthermore, it is offensive and contrary to the oath of members of the State Board of Education "to guard and maintain" the "right to the privilege of an education." N.C. Const., Art I, § 15; Art. VI, § 7.

B. The EHCA does not impose obligations on the States not stated unambiguously. To infer an obligation on States to establish an administrative process for reviewing and deciding complaints in a manner inconsistent with their form of government infringes the Tenth Amendment.

The EHCA, as noted above, is Spending Clause legislation. When Congress acts pursuant to its spending power to impose obligations on the States as a condition to the receipt of funds, it must make those obligations clear and unambiguous. This is so for two reasons. First, such legislation

often "intrudes on traditional state authority." *Pennhurst*, 451 U.S. at 16. Second, such legislation "is in the nature of a contract." Thus, the States are entitled to know their obligations in advance of accepting funds. *Rowley*, 458 U.S. at 204, fn. 26, quoting *Pennhurst*, 451 U.S. at 17. As a consequence of Congress' duty to make clear the requirements it is imposing on the States, requirements not unambiguously stated are not enforceable against the States. *Pennhurst*, 451 U.S. at 18; *Rowley*, 458 U.S. at 200. Congress did not unambiguously impose an obligation on States accepting EHCA funds to deny to State educational agencies the power to make final administrative decisions. The lack of an unambiguous prohibition is made clear by the Third Circuit's need to infer that prohibition. 839 F.2d at 120-126.

The requirement that Congress unambiguously set forth the obligations imposed on the States has a Tenth Amendment dimension. The States' rights under the Tenth Amendment are primarily protected through their participation in the legislative process. *Garcia*, 469 U.S. at 550-554. Where requirements have to be inferred, meaningful participation by the States through their elected representatives cannot have occurred. In this case, the Third Circuit has inferred a requirement that strikes at the very heart of the heretofore unquestioned authority of the States to establish an administrative process that conforms to their form of government. Such a requirement, if it can be imposed at all, certainly cannot be inferred.

CONCLUSION

North Carolina urges the Court to reverse the Third Circuit Court of Appeals, and to hold that Pennsylvania has properly vested in its Secretary of Education the power to make the final administrative decisions regarding the EHCA complaints of parents of handicapped children and that the Eleventh Amendment bars the award of damages against the States.

Respectfully submitted, this the 1st day of December, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a Special Deputy Attorney General for the State of North Carolina, and that I have served copies of the foregoing BRIEF OF AMICUS CURIAE THE STATE OF NORTH CAROLINA IN SUPPORT OF THE PETITIONER by depositing same in the United States mail first class postage prepaid, to:

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This the day 1st of December, 1988.

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